No. 72-1061

In the Supreme Court of the United States

OCTOBER TERM, 1973

WINDWARD SHIPPING (LONDON) LIMITED, ET AL.,
PETITIONERS

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

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INTEREST OF THE UNITED STATES

Pursuant to this Court's order of March 26, 1973, inviting the Solicitor General to submit a brief as *amicus curiae* at the petition stage, the United States submitted a memorandum expressing the view of the National Labor Relations Board that the court below had properly decided the case, and urging the Court to deny the petition for a writ of certiorari. The Court granted the petition on June 4, 1973 (412 U.S. 927).

Since the granting of the writ, the Solicitor General has solicited the views of other interested agencies and

departments, including the Department of State. Upon further consideration and upon concluding that it was not the intent of Congress in enacting the National Labor Relations Act to protect activity which could create serious foreign relations problems for the United States, we now urge the Court to reverse the decision below.

The decision in this case could have serious consequences for United States trade, balance of payments, and the economy and give rise to troublesome problems in United States foreign relations. At the present time, foreign-flag shipping is essential to United States trade. More than 90 percent of all United States waterborne foreign trade is carried in foreign-flag ships. In particular, 95 percent of waterborne deliveries of petroleum products are made on the ships of third countries. Existing United States shipping capacity is insufficient to carry any major proportion of our trade. In these circumstances, picketing that prevents the loading or unloading of foreign-flag ships in United States ports could be severely disruptive of United States trade.

The National Labor Relations Board, however, adheres to the views expressed in the memorandum previously submitted. The Department of Labor also shares the views expressed in our earlier memorandum.

STATEMENT

The vessels *Northwind* and *Theomana* are ships of Liberian registry, which carry cargo between United States and foreign ports. The crews and officers of the vessels are foreign nationals (Pet. App. B1–B2). The

wages and other terms and conditions of employment of the crew are covered by contracts with the Pan Hellenic Seamen's Federation, the Indonesia Seafarers, and the Sierra Leone Seamen's Union (Pet. 5).

In October 1971, while both vessels were docked at the Port of Houston, Texas, for the purpose of loading and unloading cargo, six American maritime unions, acting in concert, established picket lines in front of the vessels. There were four pickets at each vessel, carrying signs which read (Pet. App. B2):

> ATTENTION TO THE PUBLIC
> THE WAGES AND BENEFITS PAID SEAMEN
> ABOARD THE VESSEL THEOMANA [NORTHWIND]
> ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN.
> THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE
> STANDARDS AND LOSS OF OUR JOBS.
> PLEASE DO NOT PATRONIZE THIS VESSEL.
> HELP THE AMERICAN SEAMEN.
> WE HAVE NO DISPUTE WITH ANY OTHER VESSEL
> ON THIS SITE.
>
> [Printed names of the six unions]

The pickets did not speak to anyone. When inquiry was made of them, they handed out literature which read (Pet. App. B2–B3):

> TO THE PUBLIC
>
> American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

Our dispute here is limited to the vessel picketed at this site, the SS [name of vessel added].

There was no labor dispute between the owners of the vessels and their crews or the foreign unions representing them while the picketing took place. None of the crewmen was a member of these unions. The picketing unions did not seek to represent the foreign crewmen. The picketing was peaceful. (Pet. App. B2.) As a result of the picketing, longshoremen and other workmen refused to service the vessels (Pet. App. B3).

The owner of the *Theomana* filed a charge with the Regional Office of the National Labor Relations Board in Houston, alleging that the unions had engaged in secondary picketing in violation of Section 8(b)(4)(B) of the National Labor Relations Act, as amended, 29 U.S.C. 158(b)(4)(B); the charge was subsequently withdrawn (Pet. 10, n. 3). The owners of both

vessels brought the present suit in a Texas state court, seeking an injunction against the picketing on the ground that it was for the purpose of inducing the owners to break their contracts with their crews and the foreign unions representing them and thus was tortious under Texas law (Pet. App. B3–B4). The trial court dismissed the suit on the ground that "the issues raised * * * are arguably within the jurisdiction of the National Labor Relations Board and that for such reason are pre-empted by the Board and this Court is without jurisdiction to proceed further" (Pet. App. A2).

The Court of Civil Appeals for the Fourteenth Judicial District of Texas affirmed. The court found that the unions' picketing was a protest directed to "allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to patronize the foreign ships" (Pet. App. B12–B13). The court recognized that the Labor Board's jurisdiction did not extend to regulating "the 'internal economy' of the foreign vessel" (Pet. App. B9) under this Court's holdings in *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, and *Incres Steamship Company* v. *Int'l Maritime Workers Union*, 372 U.S. 24. However, the Court found these cases inapposite because the "direct interference is between the consignee and the shipowner, or the shipowner and the stevedore company," rather than "between [the foreign] employer and crewmen" (Pet. App. B13).

The court concluded that the picketing here was, "at least arguably, a protected activity under section 7

of the [NLRA]. As such, it is an activity as to which the exclusive jurisdiction to determine its propriety has been preempted to the NLRB." (Pet. App. B13.)

The Supreme Court of Texas denied the shipowners' application for a writ of error (Pet. App. D1).[1]

DISCUSSION

1. The respondent unions picketed two foreign-flag ships to urge the American public not to patronize the vessels because those crewmen were being paid substandard wages, thereby jeopardizing the work opportunities of American seamen (Pet. App. B12–B13). If the substandard wages protested by the unions had been paid by an American-flag ship to its crewmen, or by a foreign-flag ship to American workers hired to load or unload the ship, such "area standards" picketing would be arguably protected by Section 7 of, and thus preempted by, the National Labor Relations Act. See *Houston Bldg. & Const. Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321; *Int'l Longshoremen's Association, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195.

The basic question is whether the fact that the substandard wages protested were paid by foreign-flag ships to foreign nationals, who were working under contracts negotiated with foreign unions, put the pick-

[1] The Supreme Court of Alabama has recently held that similar picketing by the respondents in Alabama is not preempted by the National Labor Relations Act. *American Radio Ass'n* v. *Mobile Steamship Ass'n*, 83 LRRM 2567 (decided May 3, 1973). But see *contra*, *Mountain Navigation Co.* v. *Seafarer's Int'l Union*, 348 F. Supp. 1298 (W.D. Wis.); *Manners Navigation Co.* v. *Seafarers*, 82 LRRM 2433.

eting here beyond the protections and jurisdictional preemptions of the National Labor Relations Act.

2. "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. *Wildenhus's Case,* 120 U.S. 1 (1887)." *Benz* v. *Compania Naviera Hidalgo, supra,* 353 U.S. at 142. But the exercise of that jurisdiction is discretionary. "Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all" (*ibid.*). Thus there is no question that Congress has the power to subject this dispute to regulation by the National Labor Relations Board; the only question is whether it has done so.

Congress limited the jurisdiction of the Labor Board to labor disputes "affecting commerce" (29 U.S.C. 160), as that phrase is defined in 29 U.S.C. 152 and construed by this Court. In *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10 and *Incres Steamship Company* v. *Int'l Maritime Workers Union,* 372 U.S. 24, this Court held that "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U.S.C. § 152(6) [of the National Labor Relations Act]." *Incres, Supra,* 372 U.S. at 27.

These two cases, and an earlier one, *Benz* v. *Compania Naviera Hidalgo, supra,* illustrate which "maritime operations of foreign-flag ships" are not "commerce" within the meaning of the Act. In *Benz* a foreign-flag vessel temporarily in an American port was picketed by an American seamen's union, supporting the demands of a foreign crew for more favorable con-

ditions than those in the ship's articles which they signed under foreign law, upon joining the vessel in a foreign port. The Court held that the dispute was not preempted by the National Labor Relations Act, stressing the legislative history of the Act and a concern that the Labor Board's jurisdiction not hamper our foreign relations and commerce. The Court said (353 U.S. at 143–144, 146–147):

> Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between *American* employers and employees.
>
> * * * * *
>
> We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. [Emphasis added; footnote omitted.]

McCulloch and *Incres* were decided the same day. In *McCulloch* the Court held that the Labor Board was without jurisdiction to order an election upon the petition of an American seamen's union seeking to represent alien crew members of a Honduran-flag vessel, who were already represented by a Honduran

union. In *Incres* the Court held that the Labor Board had no jurisdiction over picketing by an American union formed "for the primary purpose of organizing foreign seamen on foreign-flag ships." 372 U.S. at 25–26. In *McCulloch* the Court noted the same concerns that it had in *Benz:* a lack of a clear directive from Congress and a reluctance to become embroiled in international disputes. The Court again quoted Congressman Hartley's characterization of the Act as "a bill of rights both for *American* workingmen and for their employers" (372 at U.S. 20), and reiterated the conclusion in *Benz* that the legislative history "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." 372 U.S. at 18. The Court finally expressed fear that an assertion of Labor Board jurisdiction "ultimate[ly] might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well." 372 U.S. at 19.

In *Incres, McCulloch* was considered controlling, and the Court stated its conclusion in jurisdictional terms: "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U.S.C. § 152(6) [of the National Labor Relations Act]." 372 U.S. at 27.

As developed in these cases, the test of the applicability of the Act to maritime labor disputes is whether the assertion of jurisdiction "would neces-

sitate inquiry into the 'internal discipline and order' of a foreign vessel, an intervention thought likely to 'raise considerable disturbance not only in the field of maritime law but in our international relations as well.' *McCulloch*, 372 U.S., at 19." *Int'l Longshoremen's Association* v. *Ariadne Shipping Co., supra*, 397 U.S. at 198. The question, then, is whether the picketing here so involved the "internal discipline and order" of the foreign-flag vessels as to put the dispute beyond the reach of the Act; and it does not admit of any easy answer. In our earlier memorandum in support of the respondents, we suggested that the picketing did not involve the ships' "internal discipline and order" because "[t]he unions are not seeking to represent or organize the foreign seamen employed on foreign flag ships [*McCulloch* and *Incres*], nor are they seeking to help them in a dispute which they have with their employer [*Benz*]" (United States Memo, p. 8).

In a similar vein the court below stated that "[t]here is no direct interference with the relationship between [foreign] employer[s] and crewmen. Any direct interference is between the consignee and the shipowner, or the shipowner and the stevedore company" (Pet. App. B13). But "direct interference" between the shipowner and third parties is *always* the primary consequence of dockside picketing, so that fact does not distinguish the picketing here from the picketing in *Benz* and *Incres*. Rather reference must be made to the impact of the picketing on the internal economy of the foreign vessel.

Here the picketers carried signs protesting the low wages paid by the foreign vessels to their alien crew:

"THE WAGES AND BENEFITS PAID SEAMEN ABOARD THE VESSEL THEOMANA [NORTHWIND] ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN. * * * PLEASE DO NOT PATRONIZE THIS VESSEL" (see, *supra*, p. 3). Taking the unions at their words, the immediate objective of the picketing must have been to force the foreign-flag vessels to pay higher wages and benefits to their alien crewmen than were required by their foreign articles, or negotiated by their foreign unions. This, of course, is precisely the same objective that the unions pursued in *Benz, McCulloch* and *Incres*. That the unions are trying to achieve their objective from the dockside, as it were, rather than by representation of crewmen, hardly lessens their impact on the "internal discipline and order" of the foreign-flag ships.

The respondent unions claim, however, that their real interest is not the plight of the alien crewmen, but the effect of their lower wages on the competitive position of American vessels, upon which their own jobs hinge. They *"were not interested in the internal economy* of the ship[s], but rather were interested in preserving job opportunities for themselves in this country" (Resp. Br., pp. 21–22, quoting *Marine Cooks & Stewards Union* v. *Panama Steamship Co.*, 362 U.S. 365, 371, n. 12.) But, of course, this is precisely the same long-range objective that the unions pursued in *Benz, McCulloch,* and *Incres. See* Pet. Br., pp. 13–14.

Thus the fact that the unions are pursuing a legitimate interest of their own "job opportunities here in the United States" (Resp. Br., p. 23), does not automatically make their conduct "arguably subject" to the National Labor Relations Act, which is the test of

preemption under that Act. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. The question remains whether their pursuit of that legitimate interest unduly interferes with the "internal discipline and order" of the foreign-flag vessels. As we have indicated (*supra*, p. 11), the picketing here, protesting substandard wages, would seem to affect the internal economy of the vessel as much as an attempt to raise those wages by representation of the seamen.[2]

3. This Court's recent decision in *Int'l Longshoremen's Association* v. *Ariadne Shipping Co.*, *supra*, is not inconsistent with this conclusion. In *Ariadne*, picketing was undertaken to protest the wages paid to American longshoremen who were employed by foreign vessels to handle their cargo. This Court held that the labor dispute was governed by the National Labor Relations Act and therefore preempted from state regulation. The Court reasoned (397 U.S. at 200):

> The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on

[2] It remains the position of the National Labor Relations Board and the Department of Labor that the impact which the picketing may have had on the internal economy of the foreign-flag vessels was not so great as to take it out of the ambit of the National Labor Relations Act. For, that impact was merely incidental to the unions' primary legitimate objective: protecting the job opportunities of American seamen. It was not, as in *Benz*, *McCulloch* and *Incres*, the result of a direct effort to negotiate for the foreign seamen, or to aid them in a dispute with the foreign shipowners. In the Labor Board's view, it is only such direct involvement in the labor relations of a foreign-flag vessel which renders the National Labor Relations Act inapplicable. Cf. *Marine Cooks & Stewards Union* v. *Panama Steamship Co.*, *supra*.

> their part with the ships' "internal discipline and order." Application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law. We therefore find that these longshore operations were in "commerce" within the meaning of § 2 (6), and thus might have been subject to the regulatory power of the National Labor Relations Board.

In *Ariadne,* an American longshoremen's union picketed to protest substandard wages paid to American workers and residents working exclusively on American docks, casually employed by foreign-flag vessels. There was no attempt to affect the wages paid by the foreign vessels to their own alien crewmen. Accordingly the picketing "threatened no interference in the internal affairs of foreign-flag ships * * *" (397 U.S. at 200). Here, by contrast, it is precisely the wage relationship between the foreign vessels and their alien crewmen which are protested.

4. In *Ariadne,* the Court reiterated and summarized the concern which has underlain each of the decisions in this area: that the Court not construe the NLRA so as possibly to jeopardize the foreign relations of the United States without a clear directive from Congress. The Court said (397 U.S. at 199):

> Thus we could not find [any intention to include within the Act's coverage disputes between foreign ships and their foreign crews] * * *, particularly since to do so would thrust

> the National Labor Relations Board into "a delicate field of international relations," *Benz*, 353 U.S., at 147. Assertion of jurisdiction by the Board over labor relations already governed by foreign law might well provoke "vigorous protests from foreign governments and * * * international problems for our Government," *McCulloch*, 372 U.S., at 17, and "invite retaliatory action from other nations," *id.*, at 21. Moreover, to construe the Act to embrace disputes involving the "internal discipline and order" of a foreign ship would be to impute to Congress the highly unlikely intention of departing from "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship," a principle frequently recognized in treaties with other countries. [*Ibid.*]

The picketing here is not an isolated protest; it is part of a comprehensive program of the unions representing "practically almost all American merchant seamen" to "protect and preserve their members' American employment opportunities" (Resp. Br., pp. 2, 4). Assertion of jurisdiction would inevitably "thrust the National Labor Relations Board into 'a delicate field of international relations'" (*Ariadne, supra*, 397 U.S. at 199).

The Department of State is concerned about the impact of an affirmance here upon our relations with other countries. The decision below has already provoked "vigorous protests from foreign governments" (*McCulloch, supra*, 372 U.S. at 17), as evidenced by the *amicus* brief for the Government of Liberia.

Moreover, the Governments of Italy, Norway and the United Kingdom have made representations to the Department of State requesting support for the petitioners here. These protests, while they could not overcome a clear directive from Congress, ought to be given substantial weight by the Court where the respondents are seeking a novel extension of the Act to protect their challenge to foreign-flag shipping. *Benz, supra,* 353 U.S. at 147.

5. Finally to be considered is whether Congress, in the National Labor Relations Act, intended to protect an activity which could have substantial adverse effects on our economy and foreign trade. The campaign undertaken by the respondent unions—if protected—could effectively close our ports to foreign-flag vessels. Close to 95 percent, by tonnage (and 81 percent, by value), of our waterborne foreign trade is carried on foreign-flag vessels (Preliminary Census Figures, 1972). Manifestly any significant interruption of foreign-flag service carrying United States cargo would have substantial economic consequences, not only upon shipowners, but also upon American exporters and importers and their employees, as well as those employed at our ports.

We do not suggest that the respondent unions have any purpose other than a legitimate interest in protecting their own members' job opportunities, and we would not expect that picketing—even if protected—would be used to close American ports entirely to foreign vessels. But, the specific consequences of this situation are difficult to project. Depending

on the unions' decisions, the disruptions in United States trade could be serious with attendant shortages and hardships. Some foreign carriers might not be willing to continue in the United States trade. Other foreign carriers might attempt to avert picketing by raising wages and working conditions; however, this is unlikely because wages and working conditions aboard vessels must respond to international competitive forces. The carriers may instead raise shipping rates to reflect the economic risks of picketing. Any of these results would increase the cost of United States imports, including petroleum. At the same time, the cost of United States exports would be increased to the detriment of sales and the United States balance of payments.

If this picketing is held to be protected by the National Labor Relations Act, the respondent unions will be accorded the *power* substantially to affect our trade with the rest of the world and our international relations. We do not believe that such power should be found in the National Labor Relations Act by implication. If it is to be given to respondent unions, it must be by "the affirmative intention of Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Benz, supra,* 353 U.S. at 147.

CONCLUSION

For these reasons, the judgment of the court below dismissing the complaint should be reversed.

Respectfully submitted.

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NOVEMBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973